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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-_____

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Pyramid Lake Paiute Tribe of Indians petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. pp. 28a-31a) is not yet reported. The district court's opinion (App. pp. 33a-39a) is reported at 360 F.Supp. 669 (D. D.C. 1973).

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether federal courts of equity are powerless to award attorneys' fees and other litigation expenses against a federal official when:

a. Congress has appropriated funds that can be used to satisfy the award;

b. The official has acted in an obdurate and intransigent manner in the course of the litigation; and

c. The official has acted unlawfully and in violation of his fiduciary obligation to the plaintiff.

STATUTE INVOLVED

28 U.S.C. § 2412. Costs

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States.

STATEMENT

The Pyramid Lake Tribe sued the Secretary of the Interior in 1970 alleging that since 1905 the Secretary had breached

his fiduciary obligation to the Tribe and was destroying the Tribe's principal asset, Pyramid Lake, by unlawfully and improperly disposing of Truckee River water that would otherwise replenish the lake. Pursuant to the Secretary's regulations, approximately half of the entire flow of the Truckee River historically had been diverted to the Newlands Reclamation Project. The Secretary refused to offer an explanation for the content of his regulations other than that he made a "judgment call" (354 F.Supp. at 255-56).

The district court upheld the Tribe's claims, held the Secretary's conduct to be unlawful, arbitrary, capricious, and in violation of both his fiduciary obligations to the Tribe and two earlier district court decrees which were binding on the United States. Eventually, the Secretary was ordered to publish, implement and enforce new regulations proposed by the Tribe which provide for substantially more water to Pyramid Lake. The district court's opinion on the merits is reported at 354 F.Supp. 252. The government did not appeal.[1]

After the decision on the merits, the Tribe moved for attorneys' fees and other litigation expenses including expert witness fees. The Secretary did not oppose the Tribe's motion. The district court granted the motion and awarded the Tribe the sum of $106,197.21 consisting of $20,488.72 in expert witness fees and expenses, $9,178.49 in attorneys' travel expenses, and $76,530 in attorneys' fees computed on the basis of 2,551 hours at the "bedrock minimum" rate of $30 per hour[2] (App. pp. 38a-39a).

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[1]This Court dealt with another aspect of the Pyramid Lake problem in denying the motion of the United States for leave to file an original complaint against the States of Nevada and California. United States v. Nevada, 412 U.S. 534 (1973).

[2]For ease of reference, throughout this Petition the expert witness fees and expenses and the attorneys' travel expenses awarded by the district court will be subsumed under the category of "attorneys' fees" since they are governed by identical considerations.

With respect to its award of attorneys' fees, the district court specifically found:

1. "The Tribe is impoverished. The Reservation is a 'depressed area' and the Tribe's legal expenses alone approximate its entire income" (App. p. 34a);

2. That the Secretary "breached his fiduciary obligation to the Tribe by a course of conduct which continued over a substantial period of time" (App. p. 34a);

3. That the Secretary's representatives acted in an "obdurate and intransigent manner refusing in good faith to carry out the Court's directives," and "unnecessarily extended the litigation to the detriment of the Tribe" (App. p. 34a);

4. That "[m]uch of the work performed [by the Tribe's experts] would not have been required if the Secretary of the Interior had come forward with its experts to provide information which the Court had indicated it desired in order to resolve the issues" (App. pp. 38a-39a); and

5. That "[t]he record in this case establishes the strongest possible basis under decisions governing the discretion of an equity judge for the award of attorneys' fees and expenses" (App. p. 33a).

The district court held that 25 U.S.C. § § 175 and 476 authorize the award of attorneys' fees against the federal government in those instances where federal officials have breached their fiduciary obligations to American Indians through the improper disposal or waste of tribal assets.

The Court of Appeals reversed in a per curiam decision. Without disputing any of the findings of the district court, the Court of Appeals stated that the general rule, codified in 28 U.S.C. § 2412, is that in the absence of a statute directly authorizing it, courts will not give judgment against the

United States or federal officials for attorneys' fees, citing *United States v. Worley*, 281 U.S. 339, 344 (1930). It held that the statutes relied upon by the district court did not constitute the requisite consent.

REASONS FOR GRANTING THE WRIT

Background

This Court's decisions in *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968) and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) have touched off a revolution in the area of equitable awards of attorneys' fees.[3] Prior to *Newman* and *Mills*, there was virtually no authority for the award of attorneys' fees in the absence of either a specific statutory directive or a monetary recovery. Since 1970, there has been a plethora of federal court decisions awarding attorneys' fees in many different contexts in the exercise of the federal courts' equitable jurisdiction.[4]

As an important part of this recent revolution, courts have begun to consider the propriety of equitable awards of attorneys' fee against state and federal officials. In *Sims v. Amos*, 340 F.Supp. 691 (M.D. Ala. 1972), *aff'd*, 409 U.S. 942 (1972), this Court affirmed an award of attorneys' fees and expenses against Alabama's governor, state attorney general, secretary of state and several state legislators notwithstanding their claims of Eleventh Amendment immunity. This case is the first one to come to this Court after *Newman*, *Mills* and their progeny to present the questions of whether,

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[3]More recently, this Court has upheld attorneys' fee awards or reversed refusals to grant attorneys' fees in Hall v. Cole, 412 U.S. 1(1973), Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427 (1973), and Bradley v. School Board of City of Richmond, ___ U.S. ___, 40 L.Ed.2d 476 (1974). *See also* F. D. Rich Co. v. United States for the Use of Industrial Lumber Co., ___ U.S. ___, 40 L.Ed.2d 703, 712-14 (1974).

[4]*See* cases collected in Stanford Daily v. Zurcher, 366 F.Supp. 18 (N.D. Cal. 1973), and Nussbaum, *Attorneys' Fees in Public Interest Litigation*, 48 N.Y.U. L. Rev. 301 (1973).

to what extent, and under what circumstances federal officials are subject to equitable awards of attorneys' fees. The Petition for Certiorari in *Jordon v. Gilligan*, No. 74-____, raises the related question of whether state officials are immune from awards of attorneys' fees by federal courts. *See* discussion *infra* at pp. 13-14.

If anyone other than federal officials were the defendants in this action, there would be no question about the propriety of the attorneys' fee award. The district court's specific finding that the defendant's representatives acted in an "obdurate and intransigent" manner, standing alone, would be sufficient to justify the award.[5] It has also long been recognized that fiduciaries are liable for attorneys' fees where, as here, litigation is necessitated by some failure of duty on their part.[6] In addition, the more recently articulated "private attorney general" rationale[7] applies to the facts and circumstances of this case. Boiled down to its essentials, the question presented here is whether the Pyramid Lake Tribe will be required to bear large litigation and attorneys' fee expenses it can ill afford, that were necessitated by the defendant's misconduct, solely because it is litigating against, and its trustee happens to be, a federal official.

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[5]"[I]t is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" Hall v. Cole, *supra*, 412 U.S. at 5. In Stolberg v. Members of Bd. of Tr. for State Col. of Conn., 474 F.2d 485 489-91 (2d Cir. 1973), an attorneys' fee award against state officials was predicated on their "unreasonable, obdurate obstinacy."

Awarding attorneys' fees on this basis long predates the recent *Newman-Mills* line of cases. *See Newman, supra*, 390 U.S. at 402, n. 4; Bell v. School Bd. of Powhatan County, 321 F.2d 494 (4th Cir. 1963), cited with approval in Hall v. Cole, *supra*, 412 U.S. at 5.

[6]Crutcher v. Joyce, 146 F.2d 518 (10th Cir. 1945); Annotation, "Allowance of attorneys' fees in, or other costs of, litigation by beneficiary respecting trust," 9 A.L.R.2d 1132 at 1243 *et seq.* and 1249 *et seq.*

[7]*See, e.g.*, Hall v. Cole, *supra*, 412 U.S. at 5, n. 7; Bradley v. School Board of City of Richmond, *supra*, ____ U.S. at ____, 40 L.Ed.2d at 493-94.

The rule that provides the point of departure in determining whether federal officials are exempt from attorneys' fee awards was expressed in one of this Court's most recent attorneys' fee decisions. Federal courts of equity ought not to conclude that their "historic" power to award attorneys' fees has been limited in the absence of "a definitive and absolute setting of the Congressional face against the giving of such incidental relief." *Hall v. Cole, supra,* 412 U.S. at 12. Petitioner contends that there is no Act of Congress that negates the power of the district court to make an equitable attorneys' fee award against the Secretary of the Interior in the circumstances of this case and what law there is, although confusing and requiring clarification, points toward affirming the district court's award.

I. THE PROPER INTERPRETATION OF 28 U.S.C. § 2412 AS APPLIED TO ATTORNEYS' FEE AWARDS AGAINST GOVERNMENT OFFICIALS PRESENTS AN IMPORTANT QUESTION OF FIRST IMPRESSION.

Several lower federal courts have looked at 28 U.S.C. § 2412 (hereinafter § 2412) and concluded, in many instances without analysis of its language or its legislative history, that it precludes awards of attorneys' fees against federal officials.[8] This Court should step in to correct what a recent law review article terms this "consistent miscon-

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[8]Wilderness Society v. Morton, 495 F.2d 1026, 1036 (D.C. Cir. 1974); Natural Resources Defense Council v. Environmental Protection Agency, 484 F.2d 1331 (1st Cir. 1973); Adams v. Carlson, 375 F.Supp. 1228, 1242-44 (E.D. Ill. 1974); Sierra Club v. Lynn, 364 F.Supp. 834, 849 and 851-52 (W.D. Tex. 1973); and Committee to Stop Route 7 v. Volpe, 4 E.R.C. 1681, 1682 (D. Conn. 1972). In a few of these cases, notably Wilderness Society v. Morton, the § 2412 question was neither presented nor briefed since the plaintiff sought attorneys' fees only against non-federal defendants.

Wilderness Society was decided by the United States Court of Appeals for the District of Columbia Circuit *en banc* while this case was pending. Its treatment of the § 2412 question, considered *sua sponte*, probably accounts for the per curiam and summary nature of the Court of Appeals opinion below.

struction" of the statute,[9] particularly because of its potential applicability to many cases pending in the lower federal courts.

Section 2412 was enacted in its present form in 1956 prior to this Court's decisions in *Newman* (1968) and *Mills* (1970) and some six years before any court had awarded attorneys' fees against government officials acting in their official capacities. Neither the literal language of the statute, nor its purpose, nor its legislative history, reveal a Congressional intent to deprive a court of equity of its inherent power to award attorneys' fees.

A. Equitable attorneys' fee awards are not costs and are not covered by § 2412.

Section 2412 is entitled "Costs." Pursuant to Rule 54(d), F.R.C.P., "costs" are "allowed as of course to the prevailing party" and are taxed routinely by the clerk. Section 2412 precludes awards of attorneys' fees from being treated as an item in the bill of costs which are taxable by the clerk. It does not address the entirely separate question of whether an award of attorneys' fees can be made pursuant to motion in the exercise of a federal court's equitable discretion to do complete justice.

The distinction between attorneys' fees and "costs which are strictly chargeable as between party and party" was made by this Court in one of the first of its attorneys' fee cases, *Trustees of the Internal Improvement Fund v. Greenough*, 105 U.S. 527 (1882). It held the "fee bill" of 1853, which limited the kinds of "fees" that can be taxed in the courts of the United States, applied only to "taxable costs, commonly so called, and may have its full effect without being construed to take away the power of a court of equity to permit counsel fees." 105 U.S. at 535.

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[9]King and Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation*, 41 Tenn. L. Rev. 27, 88 (1973).

Prior to its amendment in 1966, litigants who prevailed against a federal party could not obtain otherwise taxable costs except in a very few cases where statutes specifically provided for it. However, when a federal party prevailed, he could obtain his costs under Rule 54(d). The purpose of the 1966 amendment was to correct this inequity. "It is fundamental that the law should be uniform in its application. This bill will provide for uniformity of treatment in the award of costs." S. Rep. No. 1329, 89th Cong., 2d Sess. 2 (1966), reprinted at 1966 U.S. Code Cong. & Admin. News 2528.

The question then arises as to why reference to attorneys' fees was even included in the language of § 2412 since the statute to which it refers in defining taxable costs, 28 U.S.C. § 1920, does not make any direct reference to attorneys' fees.[10] The answer is that Congress was acting out of an abundance of caution, to insure that § 2412 could not be construed as governmental consent to awards of attorneys' fees as items of costs. Although there is a distinction between costs and attorneys' fees, it is somewhat confusing and has not always been observed.[11] Without the exclusionary language of § 2412, the term "costs" possibly could have been interpreted as a general authorization for awards of attorneys' fees against the United States.[12]

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[10]Section 1920 does however include among its authorized costs "docket fees" which apparently are a form of attorneys' compensation.

[11]For example in Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974), attorneys' fees were sought and approved as a component of the plaintiffs' "bill of costs." In Jordon v. Gilligan, ___ F.2d ___ (No. 73-1973, 6th Cir., July 18, 1974), the district court first awarded attorneys' fees and subsequently ordered them taxed as costs. Another illustration is that Alaska Statutes § 09.60.010 delegates authority to the Alaska Supreme Court to determine "what costs, if any, including attorneys' fees" should be allowed. Under this and predecessor statutes, attorneys' fees have been routinely awarded as costs by the state and federal courts in Alaska.

[12]The first clause of § 2412, "except as otherwise specifically provided by statute," confirms the continuing effect of statutes providing that in certain kinds of cases no costs can be awarded against the United States or authorizing some costs in addition to those permitted by § 2412 and 28 U.S.C. § 1920. *See, e.g.*, 43 U.S.C. § 666(a); 30 U.S.C. § 32; 17 U.S.C. § 116; 28 U.S.C. § 1928; and 28 U.S.C. § 2465.

The legislative history of § 2412 reveals that the issue of attorneys' fees was not of any great concern. There was no debate in which the pros and cons of making the government liable for awards of attorneys' fees was argued. Assistant Attorney General Douglas, the principal administration witness in support of the Justice Department-sponsored bill, stated: "The payment of attorneys' fees raises many issues in various types of litigation that should be considered, if at all, in separate legislation."[13]

B. Section 2412 does not prohibit attorneys' fee awards in suits that are within the federal courts' inherent equitable jurisdiction.

One other distinction is important in ascertaining the correct meaning of § 2412, the difference between a suit against the United States to which the sovereign must consent and a suit against a governmental officer charged with acting in violation of the Constitution or in excess of his statutory authority. The latter situations constitute exceptions to the sovereign immunity doctrine and therefore do not require governmental consent. *Larson v. Foreign and Domestic Corp.*, 337 U.S. 682, 689-91 and 701-02 (1949); *Dugan v. Rank*, 372 U.S. 609, 621-22 (1962).

In enacting § 2412, Congress apparently had in mind those kinds of suits for which governmental consent is required,[14] in which the court's jurisdiction is defined and limited by the terms of Congressional consent. There was no consideration of suits against governmental officials that are within the in-

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[13]Hearing on H.R. 14182 Before Subcomm. No. 2 of House Comm. on Judiciary, 89th Cong., 2d Sess. 11 (1966).

[14]*See, e.g.*, S. Rep. No. 1329, 89th Cong., 2d Sess. 2 (1966), reprinted at 1966 U.S. Code Cong. & Admin. News 2528: "This bill will provide for uniformity of treatment in the award of costs. Apparently the present inequality is related to a governmental advantage derived from the principle favoring immunity of the sovereign from suit. Under modern conditions, there is no reason for this advantage *when the law provides for suit against the Government*" (emphasis added).

herent equitable jurisdiction of the federal courts. As we shall show *infra* at pp. 15-16, the rule that, in the absence of a statute directly authorizing it, courts will not give judgment against the United States for attorneys' fees has its origin in and is limited to suits requiring govermental consent.

The observation in the transmittal letter to the Senate from Attorney General Katzenbach quoted in the decision of the Court of Appeals[15] merely affirms that § 2412 was not intended to authorize awards of attorneys' fees against the government as an element of taxable costs. There is no statement in the Attorney General's letter or any place else in the legislative history that § 2412 was intended to deprive equity courts of jurisdiction they might otherwise have to award attorneys' fees against federal officials.

> Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).[16]

II. THERE ARE CONFLICTING SUPREME COURT DECISIONS REGARDING WHETHER AND WHEN ATTORNEYS' FEES CAN BE AWARDED BY COURTS OF EQUITY AGAINST FEDERAL OFFICIALS.

No recent lower court decision that has considered awarding attorneys' fees against the federal government or federal

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[15]Mr. Katzenbach stated that the bill "makes it clear that the fees and expenses of attorneys may not be taxed against the United States" (App. p. 29a). S. Rep. No. 1329, 89th Cong., 2d Sess. 5 (1966), reprinted at 1966 U.S. Code Cong. & Admin. News 2531.

[16]Porter v. Warner Holding Co. and its progeny, upholding the federal courts' exercise of the full range of their equitable powers in the absence of a restriction in an Act of Congress, was reaffirmed recently in Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1 at 19-20 (1974).

officials *(see* note 8 *supra)* has gotten past the threshold immunity issue. They have all been stopped dead in their tracks concluding that such awards are precluded by either § 2412,[17] or some generalized notion of sovereign immunity,[18] or, as in this case, the unanalyzed dictum of *United States v. Worley, supra.* Two highly relevant lines of authority have been totally ignored: (1) cases (most notably *Sims v. Amos,* 340 F.Supp. (M.D. Ala. 1972), *aff'd,* 409 U.S. (1972)) holding state officials who act beyond the scope of their authority or in violation of the Constitution liable for attorneys' fees; and (2) *Reconstruction Finance Corp. v. J. G. Menihan Corp.,* 312 U.S. 81 (1941), holding that a statute authorizing a federal agency "to sue and be sued" subjects that agency to all of the ordinary incidents of litigation, including attorneys' fees, on an equal footing with private litigants.

Once it is recognized that § 2412 neither prohibits nor authorizes attorneys' fee awards against federal officials, it is to this body of law that courts must turn in determining the liability of federal officials to equitable attorneys' fee awards. In this case, the award to the petitioner should be affirmed on one of three alternate grounds: (1) the federal courts have the power to award attorneys' fees against federal officials who act beyond the scope of their authority; (2) that federal courts have the power to award attorneys' fees against federal officials who act in an "obdurate and intransigent manner"; or (3) if some form of consent is required, the federal government has consented to this award under the criteria of *Reconstruction Finance Corp. v. J. G. Menihan Corp.,* 312 U.S. 81 (1941). The dictum of *United States v. Worley* has no application to cases within the federal courts' inherent equitable jurisdiction and is not an accurate statement of the law (see pp. 14-16 *infra*).

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[17] *See, e.g.,* Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974).

[18] *See, e.g.,* Cassata v. Federal Savings & Loan Finance Corp., 445 F.2d 122 (7th Cir. 1971).

A. Sims v. Amos holds that government officials who act beyond the scope of their authority or in violation of the Constitution are not immune from attorneys' fee awards.

In the only case in which this Court has had occasion to rule whether federal courts of equity can hold state governmental officials liable for attorneys' fees when they are found to have acted in excess of their statutory authority or in violation of the Constitution, the lower court's award of attorneys' fees was affirmed. *Sims v. Amos*, 340 F.Supp. 691 (M.D. Ala. 1972), *aff'd*, 409 U.S. 942 (1972). The *Sims* case was described as follows in *Gates v. Collier*, 489 F.2d 298, 302 (5th Cir. 1973):

> [T]he District Court for the Middle District of Alabama dealt with the award of attorneys' fees and expenses incurred in a suit against the Governor, state legislators, the attorney general and the secretary of state of Alabama. The Court expressly held against the "Alabama State Legislators, the Governor, the Attorney General and the Secretary of State."
>
> In their jurisdictional statement to the Supreme Court, the defendants in *Sims* stated:
>
> "the award to the plaintiffs of their attorney's fees and expenses incurred and in the taxing of these items as costs against the defendants who are elected state officials sued in their official capacity . . . was tantamount to the award of a money judgment against the State of Alabama in direct violation of the doctrine of sovereign immunity."
>
> The Supreme Court affirmed the judgment of the three-judge district court without opinion.

The theory supporting attorneys' fees awards against state officials found to have acted beyond the scope of their statu-

tory authority is that the state may no more immunize an individual from costs, including attorneys' fees, incident to an injunction than it may insulate him from the injunction itself. *Sims v. Amos, supra,* 340 F.Supp. at 694, n. 8.

There is no reason why the holding and rationale of *Sims v. Amos* should not apply equally to this case in which federal officials were found to have acted beyond the scope of their statutory authority. In the wake of this Court's decision in *Edelman v. Jordan*, ___ U.S. ___, 39 L.Ed.2d 662 (1974), which held, five to four, that awards of retroactive welfare benefits against state officials are barred by the Eleventh Amendment, a conflict in the circuits has developed as to whether the Eleventh Amendment also bars equitable awards of attorneys' fees against state officials. Some courts have followed the *Sims v. Amos* holding and others have extended *Edelman v. Jordan* to bar attorneys' fee awards.[19] The question as to Eleventh Amendment immunity of state officials from attorneys' fee awards is presented in the Petition for Certiorari filed in *Jordon v. Gilligan*, No. 74-___. Of course, even if awards of attorneys' fees are barred as against state officials, the Eleventh Amendment can have no application to suits against federal officials.

The determination of the Court of Appeals that attorneys' fees cannot be awarded against federal officials even when they are found to have acted obdurately and intransigently during the course of litigation sets a dangerous precedent. It is of critical importance to the administration of justice for the judiciary to be able to exercise control over its cases

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[19]It is interesting to note that Sims v. Amos was not cited in the *Edelman* decision despite *Edelman*'s over-ruling of three prior Supreme Court summary affirmances of three-judge district court decisions on the Eleventh Amendment question. 39 L.Ed.2d at 676-77. Ancillary attorneys' fee awards, which are predicated upon and measured by events and conduct that take place only after a lawsuit is initiated, are more comparable to awards of costs against the state (specifically approved in Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1972)) than to retroactive welfare benefits to a class struck down in *Edelman. See* Jordan v. Fusari, 496 F.2d 646 (2d. Cir. 1974).

and the litigants that appear before it. Surely, the court created doctrine of sovereign immunity cannot extend to immunizing federal officials who abuse the judicial process. No governmental function is furthered by such a result.

B. United States v. Worley is not good precedent for barring federal courts of equity from awarding attorneys' fees against federal officials who act unlawfully or obdurately.

United States v. Worley, 281 U.S. 339 (1930) was a suit by the mother of a deceased veteran against the United States to recover certain disability payments. The United States acted as insurer pursuant to certain federal statutes which contained provisions authorizing both suits against the United States in the event of disagreement as to claims and awards of attorneys' fees as a percentage of the recovery.[20]

The district court in *Worley* awarded attorneys' fees as a percentage of the recovery as authorized by the statute. Reversing in part, the Court of Appeals lowered the amount of the award, holding that it violated the statute by being based not only upon the principal of the judgment but also upon the interest which was erroneously included. In addition, the Court of Appeals reversed the district court's award of costs. 42 F.2d 197, 202 (8th Cir. 1930). The Supreme Court upheld the Court of Appeals on both counts stating, "in the absence of a statute directly authorizing it courts will not give judgment against the United States for costs or expenses." 281 U.S. at 344.

Thus, with regard to the issue of attorneys' fees, *Worley* merely lowered the amount of an award to comport with the

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[20]Section 405 of the Act of October 6, 1917, 40 Stat. 398 at 410, as amended by Sections 19 and 500 of the Act of June 7, 1924, 43 Stat. 607 at 612-13 and 628, and Section 17 of the Act of March 4, 1925, 43 Stat. 1302 at 1311. At the time of the *Worley* decision, this section of the veterans law was codified at 38 U.S.C. § 551.

specific requirements of the statute under which the United States had consented to be used. There was no occasion to consider whether attorneys' fees could be awarded by a court of equity against federal officials who act unlawfully or obdurately when there is no statute defining or prohibiting such awards.

When sovereign immunity applies and statutory consent to be sued is therefore necessary, it is logical to require that the sovereign must also specifically consent to attorneys' fee awards. But where, as here, sovereign immunity does not preclude a suit for equitable relief against federal officials, an entirely different question is presented.[21]

Not surprisingly, *United States v. Worley* has not been cited in any subsequent decision of this Court for its attorneys' fee holding.[22]

C. The dicta of United States v. Worley has been superseded by the holding of RFC v. J. G. Menihan Corp.

Most notably, *United States v. Worley* was neither considered nor cited in *Reconstruction Finance Corp. (RFC) v. J. G. Menihan Corp.*, 312 U.S. 81 (1941). Thus, this Court appears to have disapproved the *Worley* dicta *sub silentio*. RFC, a wholly owned corporate agency of the United States,

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[21]*See, e.g.*, Fairmont Creamery Co. v. Minnesota, 275 U.S. 70, 74 (1927): "It [the State of Minnesota] is not here by the state's consent but by the virtue of a law, to which it is subject. Though a sovereign, in many respects, the state when a party to litigation in this court loses some of its character as such."

[22]The only authority cited in *Worley* with respect to the question presented here was United States v. Chemical Foundation, 272 U.S. 1, 20 (1926), which was a suit initiated by the United States to set aside sales of certain trademarks and patents to the Chemical Foundation. Only costs, not attorneys' fees, were involved. The Supreme Court reversed the district court's decree authorizing the Chemical Foundation to recover stenographers' expenses and printing costs against the United States. Again, there was no occasion to consider the powers of a court of equity to award attorneys' fees against federal officials who have acted in excess of their authority or in an obdurate and intransigent manner.

sued Menihan to enjoin its use of certain trademarks, and RFC lost. The Supreme Court, speaking unanimously through Chief Justice Hughes, held that by endowing RFC with the authority "to sue and be sued," Congress had made it liable for the usual incidents of suits, including both costs and attorneys' fees. It applied precisely the opposite rule from the *United States v. Worley* dictum relied upon by the Court of Appeals. No express waiver is required.

> [W]aivers by Congress of governmental immunity from suit should be liberally construed in the case of federal instrumentalities — that being in line with the current disfavor of the doctrine of governmental immunity. 312 U.S. at 84.
>
> We perceive no reason for holding that [RFC] may avail itself of the judicial process in accordance with the authority conferred upon it and escape the usual incidents of that process. . . . On the contrary, we think that the unqualified authority to sue and be sued placed [RFC] upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances. 312 U.S. at 85-6.[23]

Unlike *United States v. Worley*, which had not been heard from until resuscitated by the Court of Appeals, *RFC v. Menihan* is still regarded as good and vital law. It was cited and relied upon recently by both the majority and dissent in *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 143, 150 (1971). Nevertheless, it has not been distinguished or even cited in any of the recent lower court decisions involving attorneys' fee awards against federal officials, including, of course, both opinions below.

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[23]The Supreme Court rejected the dissenting views of Judge Clark in the Court of Appeals who had relied on United States v. Worley and other authorities for the proposition that "costs are never awarded against the United States except where there is a direct statutory authority going beyond mere permission to bring suit." 111 F.2d 940 at 942-43 (2d Cir. 1940).

D. This case is much stronger than RFC v. Menihan for implying governmental consent to attorneys' fee awards.

Application of the rule of *RFC v. Menihan* here unquestionably requires reversal of the decision of the Court of Appeals and affirmance of the district court's award. The only basis for implying consent in the *RFC* case was the "sue and be sued" language in the RFC enabling legislation. The following considerations are relevant here:

1. To the extent that statutory consent to be sued is necessary or required, this suit was brought under the Administrative Procedure Act, 5 U.S.C. § § 701, *et seq.*, which constitutes such consent.[24]

2. Federal officials are not only authorized, but are required, to initiate and prosecute appropriate legal action in order to protect and preserve Indian property. 25 U.S.C. § 175.

3. Congress has acted to insure that Indian tribes can retain their own attorneys so that they can take legal action on their own to prevent dissipation of their resources when the government is not able or willing to do so. 25 U.S.C. § 476. *See* the discussion of this statute in the district court's opinion (App. p. 36a).

4. While *RFC v. Menihan* involved "a governmental agency launched into the commercial world," 312 U.S. at 84-5, this case involves a governmental agency performing as a fiduciary for a limited class of beneficiaries. *United States v. Mason*, 412 U.S. 391 (1973). Just as RFC's lia-

[24] *See, e.g.*, Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 873-74 (D.C. Cir. 1970). While this Court has not specifically ruled that the Administrative Procedure Act is a waiver of sovereign immunity, that holding seems to be implicit in such cases as Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) and Morton v. Ruiz, 415 U.S. 199 (1974).

bility for the usual incidents of litigation was determined in the context of its operations in the commercial world, so too the Secretary's liability for attorneys' fee awards in this case should be judged in light of the breach of his unique fiduciary responsibilities to the Tribe which necessitated the Tribe's lawsuit. *See Vaughan v. Atkinson*, 369 U.S. 527 (1962). In such circumstances, trustees are liable for attorneys' fees *(see* note 6 *supra)*. The fiduciary standards assumed by the federal government take on added significance in view of the district court's finding that the Secretary's representatives acted in an obdurate and intransigent manner. *See Stolberg v. Members of Bd. of Tr. for State Col. of Conn.*, 474 F.2d 485 (2d Cir. 1973).

5. Most significantly, the Snyder Act, 25 U.S.C. § 13, authorizes the expenditure of funds appropriated to the Bureau of Indian Affairs for the purposes, *inter alia*, of "advancement and general administration of Indian property" and "development of water supplies." Pursuant to this authorization, Congress has appropriated large sums in recent years for the specific purpose of protecting Indian water rights.[25] Indian tribes have used these funds for the purposes of retaining expert hydrologic consultants and attorneys to assess the extent of Indian water rights and to prosecute

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[25]For fiscal year 1973, the Interior Department asked for and received $1,750,000 for protection of Indian water rights. *See* Hearings on the Department of the Interior and Related Agencies Appropriations for 1973 Before the House Subcomm. of the Comm. on Appropriations, 92nd Cong., 2d Sess., pt. 2, at 23, 132-33, 158 (1972); H.R. Rep. No. 92-1119, 92d Cong., 2d Sess. 11 (1972); S. Rep. No. 92-921, 92d Cong., 2d Sess. 7 (1972); H.R. Rep. No. 92-1250 (Conference Report), 92d Cong., 2d Sess. 4 (1972); Act of August 10, 1972, 86 Stat. 508, 509.

For fiscal year 1974, the Interior Department asked for and received $1,756,000 for protection of Indian water rights. *See* Hearings on the Department of the Interior and Related Agencies Appropriations for 1974 Before the House Subcomm. of the Comm. on Appropriations, 93rd Cong., 1st Sess., pt. 4, at 704 and 723 (1973); H.R. Rep. No. 93-512 (Conference Report), 93rd Cong., 1st Sess. 5 (1973); Act of October 4, 1973, 87 Stat. 429, 431.

Indian water rights litigation.[26] It is difficult to argue that Congress has not consented to this attorneys' fee award to the Pyramid Lake Tribe when it has appropriated funds for exactly the same purposes as would be served by the award, and the Secretary's obdurate conduct frustrated that Congressional purpose.

In what is perhaps the most thoughtful Court of Appeals opinion concerning the current status of sovereign immunity, the Ninth Circuit has concluded that the defense is still viable where the relief sought would "work an intolerable burden on governmental functions, outweighing any consideration of private harm." *State of Washington v. Udall*, 417 F.2d 1310, 1318 (9th Cir. 1969).[27] Certainly, in this case, where Congress has appropriated funds for the identical purposes that would be served by the district court's award, there is no conceivable way in which the award can be said to work an "intolerable burden" on a governmental function. The governmental function, protecting Indian water rights, would be significantly advanced and strengthened.

This case involves every conceivable consideration bearing on whether attorneys' fee awards can ever be made by federal courts of equity against federal officials absent express statutory authorization including obduracy, unlawful conduct, breach of fiduciary obligation and availability of appropriated funds to satisfy the award. Thus, it presents the ideal

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[26]The uses to which these funds have actually been put by the Bureau of Indian Affairs was not developed at the district court level since the Tribe's motion for attorneys' fees was unopposed and consequently no hearing was held. However, the question of whether the Congressionally appropriated funds have been channeled by the Bureau to pay for private attorneys retained by the various tribes did come up at oral argument before the Court of Appeals and the Secretary's counsel conceded that there are such funds that have been used for that purpose.

In this state of the record, it might be appropriate for the judgment of the Court of Appeals to be reversed and the case remanded to the district court for a determination of whether there are Congressionally appropriated funds available to satisfy the award.

[27]This formulation has been followed in *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971).

opportunity for this Court to review this complex area and to give direction to the lower courts. Unfortunately, neither of the decisions below nor, for that matter, any lower court decision subsequent to *RFC v. Menihan* in 1941, has given this subject the treatment and analysis it merits.

III. EQUITABLE AWARDS OF ATTORNEYS' FEES ARE REQUIRED TO IMPLEMENT CONGRESSIONAL POLICY, AND TO MAKE COURTS ACCESSIBLE TO MINORITY INTERESTS.

During its last four terms, this Court has repeatedly recognized and emphasized the critical importance of attorneys' fee awards in carrying out Congressional policy. "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose." *Hall v. Cole, supra,* 412 U.S. at 13. Both *Bradley v. School Board of Richmond,* ___ U.S. ___, 40 L.Ed.2d 476, 492 (1974) and *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 211 (1972) stress that "the main generating force" in vindicating crucial Congressional policies must be private suits. But, as the district court's opinion in *Bradley* stated: "To secure counsel willing to undertake the job of trial . . . necessarily means that someone — plaintiff or lawyer — must make a great sacrifice unless equity intervenes." 53 F.R.D. 28, 40 (E.D. Va. 1971), quoted with approval at 40 L.Ed.2d at 492, n. 25. "Without counsel fees the grant of federal jurisdiction is but a gesture for few . . . could avail themselves of it." *Hall v. Cole, supra,* 412 U.S. at 13.

The availability of attorneys' fees is particularly vital in certain kinds of cases of which this is an excellent example.

> A characteristic of many of the cases [in which attorneys' fees have been awarded] is that the plaintiff represented a minority group or interest and only by resort to the courts would the plaintiff

> ensure that the defendants fulfilled their fiduciary or other obligations to persons in the plaintiff's situation. Particularly where the defendant is a governmental entity such litigation may be regarded as a means of offsetting the possibly limited opportunities for minority interests to assure through the political process that their governing bodies fulfill their duties to them as part of their obligations to the general community.[28]

Here the Secretary's unlawful conduct which also constituted a breach of his fiduciary obligation to the Pyramid Lake Tribe continued for decades until it was enjoined by the district court.

The failure of the federal government to honor its fiduciary obligations to Indian tribes, particularly neglect of its duty to protect and preserve Indian water rights, has been acknowledged and documented in recent years by the President,[29] by the courts,[30] by the Department of the Interior, by a Congressional subcommittee, by commentators and by the testimony of virtually every one of the nation's Indian tribes.[31] Awarding attorneys' fees in this case would imple-

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[28]Brief for the United States as Amicus Curiae in *Bradley v. School Board of City of Richmond*, No. 72-1322 (Oct. Term 1973), p. 10, n. 6.

[29]President's Message to Congress on Indian Affairs, 116 Cong. Rec. 23131, 23135 (July 8, 1970).

[30]*See, e.g.*, United States v. Ahtanum Irr. Dist., 236 F.2d 321, 338 (9th Cir. 1956), *cert. denied*, 352 U.S. 988.
In Edwardsen v. Morton, 369 F.Supp. 1359 (D. D.C. 1973), the Secretary was found to have violated his obligations to Alaskan Natives. The district court subsequently issued an order requiring the Secretary to pay the plaintiffs' attorneys' fees based upon the holding of the district court in this case (D. D.C., Civil No. 2014-71, Order and Memorandum of December 21, 1973 and Memorandum-Order of May 24, 1974).

[31]Hearings on Administrative Practices and Procedures Relating to Protection of Indian Natural Resources Before the Senate Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary, 92d Cong., 1st Sess., pts. 1 through 7 (1971 and 1972).

ment Congressional and constitutional policies by: (1) providing a sanction against the Secretary's abandonment or breach of his trust responsibility; (2) encouraging the government to furnish legal representation to Indians pursuant to 25 U.S.C. § 175; and (3) making it possible for Indians to challenge the Secretary's action or inaction in court.[32] In circumstances like these, where creating a remedy is necessary in order to give force and effect to a statutory or constitutional policy, courts have not hesitated to do so. *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 402 (1971), (concurring opinion of Mr. Justice Harlan): *J. I. Case v. Borak*, 377 U.S. 426 (1964). Increasingly, fee shifting is being viewed in this context. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Hall v. Cole*, 412 U.S. 1 (1973).

> [I]t is intolerably anomalous that counsel entrusted with guarantying the effectuation of a public policy . . . as to a large proportion of citizens should be compelled to look to himself or to private individuals for the resources needed to make his proof.[33]

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[32]The availability of attorneys' fee awards can be expected to spur voluntary compliance with the law. As stated by the Solicitor General in his Brief Amicus Curiae, *supra* note 28, at p. 11, n. 7:

> Without depreciating in any way what has been accomplished by private litigation in this field, it is also fair to suggest that desegregation of the Nation's public schools required by Brown v. Board of Education, 349 U.S. 294, 301 may well have been achieved with far swifter "deliberate speed" if attorneys' fee awards had more readily been perceived to be available in such cases.

[33]Bradley v. School Board of City of Richmond, 53 F.R.D. 28, 42 (E.D. Va. 1971).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1974

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2184

PYRAMID LAKE PAIUTE TRIBE OF INDIANS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, APPELLANT

Appeal from the United States District Court for the District of Columbia

Decided June 28, 1974

PER CURIAM: Appellant Secretary of the Interior seeks reversal of a District Court order awarding the Pyramid Lake Paiute Tribe of Indians attorneys' fees and other expenses incurred by its attorneys in connection with the Tribe's successful litigation challenging the Secretary's issuance of a regulation establishing the basis for determining the amount of water to be provided the Truckee-Carson Irrigation District. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973). In response to the Tribe's subsequent motion for the award of attorneys' fees and other attorneys' expenses, the District Court ordered appellant to pay the Tribe fees and expenses totaling $106,197.31, which the Tribe was to disburse to its attorneys. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 360 F. Supp. 669 (D.D.C. 1973). The single issue presented with respect to this latter ruling is whether the District Court had authority to make the award.

The underlying litigation giving rise to the award began as an action by the Tribe against both the Secretary of the Interior and the Attorney General. The services of the

United States Attorney, whose duty to represent Indian tribes under 25 U.S.C. § 175 has been interpreted to be discretionary, *see, e.g., Rincon Band of Mission Indians v. Escondido Mutual Water Co.*, 459 F.2d 1082, 1084 (9th Cir. 1972), were "unavailable" to the Tribe in this case, *Pyramid Lake Tribe, supra*, 360 F. Supp. at 671; and it employed private counsel.

As the District Court recognized, the general rule is that "in the absence of a statute directly authorizing it courts will not give judgment against the United States for costs or expenses." *United States v. Worley*, 281 U.S. 339, 344 (1930). This rule was codified in 28 U.S.C. § 2412, which previously provided that the United States would be liable for fees and costs "only when such liability is expressly provided for by Act of Congress." Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 973.

In 1966, Congress amended the statute to authorize a more liberal grant of costs against the Government. No such liberalization was, however, made in respect of legal fees and expenses. The present statute reads, in relevant part: "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in Section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity. . . ." Examination of the legislative history of the present section reveals, as the statute itself indicates, that the congressional failure to alter the general rule governing the award of attorneys' fees was hardly an oversight. Then Attorney General Katzenbach, in a covering letter submitting the draft bill for Senate consideration, observed that the bill "makes it clear that the fees and expenses of attorneys may not be taxed against the United States." S. REP. No. 1329, 89th Cong., 2d Sess. 5 (1966). The Senate

Judiciary Committee, in addition to reprinting the Katzenbach letter in its report, observed that the "costs referred to in the section do not include fees and expenses of attorneys." *Id.* at 3.

It is thus plain, and this court *en banc* recently so stated, that the District Court is without general power to award attorneys' fees against the United States. *The Wilderness Society, et al v. Morton.* Nos. 72-1796, 1797, 1798 (D. C. Cir. April 4, 1974) *slip opinion* at 18. *See also National Resources Defense Council, et al v. EPA,* 484 F.2d 1331, 1332, 1334-35 (1st Cir. 1973); *Cassata v. Federal Savings & Loan Insurance Corp.,* 445 F.2d 1220, 125 (7th Cir. 1972). Absent direct statutory authority, award of such fees against the Government is not possible.

The District Court, while recognizing its general lack of authority to award such fees, felt that a combined reading of 25 U.S.C. §§ 175 and 476 indicated that Congress intended that Indian tribes could retain independent counsel and expect courts to award fees against the Government in cases in which the tribes were required to sue to prevent unconsented Government dissipation of tribal assets. Reading those sections in light of the legislative background discussed by the District Court, we are unable to agree.

Section 175 simply provides that "[i]n all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity." 25 U.S.C. § 175. This section, as previously mentioned, has been held to impose only a discretionary duty of representation. 25 U.S.C. § 476, upon which the District Court relied somewhat more heavily, is entitled *Organization of Indian tribes; constitution and bylaws; special election,* and provides in pertinent part:

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the con-

> stitution adopted by said tribe shall also vest in such tribe . . . the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior . . . .

However, as examination of that statute reveals, Section 476 was intended to recognize certain attributes of Indian sovereignty, reflecting the Indian Reorganization Act's overall purpose of restoring a measure of self-control and initiative to the tribes themselves. *See Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152 (1973). Certainly the requirement in Section 476 that tribal constitutions recognize a role of the Secretary of the Interior in the choice of attorneys and the establishment of their fees does not appear to represent an undertaking by the United States to pay those fees, and we are unaware of anything in the Act's legislative history that indicates that Congress intended to vest authority in the courts to impose such an obligation. *Compare* 42 U.S.C. § 1857h-2(d).

We therefore conclude that the District Court's discernment of statutory authority to award attorneys' fees in this case was in error. *Cf. United States v. Gila River Pima-Maricopa Indian Comm.,* 391 F.2d 53, 56-57 (9th Cir. 1968). And, finding no other statutory basis for award of such fees and costs against appellant, we reverse.

It is so ordered.

PYRAMID LAKE PAIUTE TRIBE
OF INDIANS, Plaintiff,

v.

Rogers C. B. MORTON, Secretary of
the Interior, Defendant.

Civ. A. No. 2506-70.

United States District Court,
District of Columbia.

June 23, 1973.

MEMORANDUM

GESELL, District Judge.

Pyramid Lake Paiute Tribe of Indians has moved for attorneys' fees and other expenses incurred by its attorneys in connection with this successful litigation against the Secretary of the Interior, D.C., 354 F.Supp. 252. Although the motion is unopposed, three questions are presented to the Court for determination. First, is this an appropriate case for the award of attorneys' fees and special expenses other than normal court costs? Second, does the Court have authority to make the award sought? Third, assuming the first two matters have been determined affirmatively, what sum is reasonable to compensate counsel and reimburse for expenses claimed?

The record in this case establishes the strongest possible basis under decisions governing the discretion of an equity judge for the award of attorneys' fees and expenses. No purpose will be served by recapitulating the record in this matter which will amply support the following factual determinations.

(1) The Pyramid Lake Paiute Tribe of Indians is impoverished. The Reservation is a "depressed area" and the Tribe's legal expenses alone approximate its entire income.

(2) The Secretary of the Interior was shown to have breached his fiduciary obligation to the Tribe by a course of conduct which continued over a substantial period of time. This was to the severe detriment of the Tribe in a manner that cannot be financially compensated.

(3) In the course of these proceedings, the Secretary's representatives acted in an obdurate and intransigent manner refusing in good faith to carry out the Court's directives, and as a consequence unnecessarily extended the litigation to the detriment of the Tribe.

(4) The determinations made in this litigation not only benefited the Tribe but in many very real respects will enhance the public interest. The litigation has given added protection to the environment in and around Pyramid Lake and it has preserved a unique natural resource. In its larger aspects it has caused a significant implementation of national policy toward Indians and encouraged the continued viability of the Lake, thus assisting declared congressional policy.

Litigation of this character should not be burdened with expense, in order to encourage suits that so clearly enhance the public interest. Wyatt v. Stickney, 844 F.Supp. 387, 409 (M.D. Ala. 1972).

No review in detail of the decisions is necessary. The following decisions emphasize the single and combined significance of the four factors mentioned as they should govern in the award of attorneys' fees and special expenses. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962); Yablonski v. United Mine Workers of America, 151 U.S.App.D.C. 253, 466 F.2d

424 (1972); La Raza Unida v. Volpe, 57 F R.D. 94 (N.D.-Cal. 1972).

A more difficult question is presented when the Court turns to a consideration of its legal authority to assess attorneys' fees and costs against the Secretary. Section 2412 of Title 28, United States Code, authorizes a judgment for costs, "not including the fees and expenses of attorneys," against an official of the United States acting in his official capacity. The usual rule, codified in § 2412, is that attorneys' fees cannot be awarded against the Government unless a statute so provides. United States v. Worley, 281 U.S. 339, 344, 50 S.Ct. 291, 74 L.Ed. 887 (1930). This provision of the Code must be read, however, in the light of 25 U.S.C. § 175 and 25 U.S.C. § 476. Read together, these two provisions show that Congress intended that the United States Attorney should represent recognized Indian Tribes in all suits at law and in equity and that as an additional safeguard Congress authorized the Tribes to employ legal counsel, "the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior," for the purpose of preventing, among other things, the disposition of tribal assets without the consent of the Tribe.

It has long been recognized that in providing the United States Attorney to assist Indians in litigation, the Congress did not make this requirement mandatory. Obviously in this instance where the Attorney General was originally named defendant and also undertook to defend the conduct of the Secretary of the Interior, his services were unavailable to the Tribe under section 175. There is no indication that the Tribe sought the approval of the Secretary of the Interior of its counsel or fees, although its right to employ counsel in this particular matter under section 476 is clear. Thus the question is presented whether 28 U.S.C. § 2412 is applicable here to bar an award for attorneys' fees in the light of the obvious intention of Congress to provide recognized Tribes with the

services of the United States Attorney or the services of private counsel in terms provided by the Secretary.

The background of section 476 is significant. It was passed as part of the Wheeler-Howard bill, 25 U.S.C. § 461, et seq. A reading of the congressional history indicates that Congress was conscious of the fact that Indian Tribes were confronting a dissipation of their assets or other rights because of various administrative actions and conflicting national policies. Accordingly, Congress sought to place Indians in a position to act on their own initiative in such situations to correct inequities and to facilitate presentation of their grievances to federal and state agencies. While not explicitly stated, certainly an aspect of these congressional determinations was the recognition that the Attorney General was not always able or willing to take up cudgels for the Tribes under section 175. Thus Tribes could retain independent counsel and expect to request the Courts for an award of attorneys' fees under specified circumstances such as the present case.

The Court has concluded that the provisions of 28 U.S.C. § 2412 are not a bar to a claim by the Indian Tribe against the Secretary of the Interior based legitimately on the contention that the Secretary has breached his trust by unlawfully and improperly disposing of tribal assets, and that in effect, the statutes provide in such situations that an award of attorneys' fees and expenses of attorneys may be made. It does not appear to the Court that the Tribe's motion should be denied because its choice of counsel and fees was not approved by the Secretary of the Interior. At no time in this lengthy litigation did the Secretary of the Interior raise any question as to the appropriateness of counsel and no objection has been made to the claim for fees. Whether or not this constitutes a waiver is perhaps beside the point, because, in any event, serious constitutional and policy objections can be raised if the statute is interpreted to require the Secretary of the Interior, when he is accused of breach of his fiduciary duty, to

have a veto power over the Tribe's selection of attorneys or the fees they are to receive in attempting to vindicate their rights against the Secretary's improper conduct.*

Given these determinations, the Court must turn to a consideration of the appropriate award to be made for attorneys' fees and other litigation expenses. The attorneys involved have submitted by affidavits detailed itemized schedules indicating the nature of the work done from day-to-day and the number of hours logged, together with an itemized statement of various expenses. The Court has reviewed these schedules with great care in the light of the Court's knowledge of the various developments in the case and is satisfied that the time logged and expenses incurred are in all respects related to the conduct of the case, given the novelty and complexity of the issues and the numerous appearances and conferences required in Washington and elsewhere.

Mr. Stitser logged 802 hours and Mr. Pelcyger, on behalf of himself and other attorneys associated with the Native American Rights Fund (NARF), shows a total of 2,032 hours, of which the bulk of the time was logged by Mr. Pelcyger himself, much of it in court. As often happens, however, some of the effort was unsuccessful, particularly in the initial stages of the case where an attempt was made to join the Attorney General as a party and to revamp the complaint in the light of Court developments. It seems appropriate, accordingly, to discount the time logged in all instances by a factor of ten percent.

As far as the appropriate time charge is concerned, Mr. Stitser, under contract with the Tribe, has done work from time to time below his normal charges at the rate of $30 an

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*See President's July 8, 1970, Message to Congress on Indian Affairs, 116 Cong. Rec. 23131, 23135 (1970), also in H.Doc. No. 91-363, 91st Cong., 2d Sess. 9-10 (1970); United States v. Ahtanum Irrigation District, 236 F.2d 321, 338 (9th Cir. 1956), cert. denied, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367.

hour. Because the other attorneys have been employed by NARF, they are unable to show any customary time charge to be considered. Mr. Stitser was the lead attorney although much of the work was done by Mr. Pelcyger. The Court has determined to compute fees to be awarded at the rate of $30 an hour for all attorneys, regardless of whether they did or did not log time in court. As all experienced attorneys realize, this charge, in the light of current conditions, is at the very bottom of the scale but the nature of the case and the circumstances under which the lawyers undertook the work justify the Court in fixing the fees at this bedrock minimum. Accordingly, the award to the Tribe will be for 722 hours of Mr. Stitser's time at $30 an hour, or $21,660, and to the NARF attorneys for 1,829 hours, at $30 an hour, or $54,870, making a total award for attorneys' fees of $76,530.

As far as incidental attorneys' expenses are concerned, the claim is limited to two matters: first, minimal travel expenses incurred by the attorneys attending court sessions, conferring with Government representatives, and the like. In addition, a claim is made for fees paid to expert witnesses, Woodward-Clevenger & Associates and Clyde-Criddle-Woodward, Inc. The attorneys' travel expenses are clearly appropriate and should be awarded as incidental expenses in the amount of $2,669.20 to Mr. Stitser, and $6,508.57 to the NARF attorneys.

A special comment or two is appropriate with respect to the fees of the expert witnesses, which include travel and expenses in the field, as well as other nontaxable costs related to the testimony given by individuals connected with the concerns retained. The outstanding qualifications of the experts was never challenged in court. The testimony they developed required detailed field experience and investigation. Much of the work performed would not have been required if the Secretary of the Interior had come forward with

its experts to provide information which the Court had indicated it desired in order to resolve the issues. The plaintiff's experts played a vital role in the resolution of the case, their work and testimony going to the heart of the matter. Accordingly, it seems entirely appropriate to award their fees as scheduled in the total amount of $20,488.72, making the award to the Tribe for all incidental expenses which are to be reimbursed by the Tribe to the claimants in the amount of $29,667.31. An appropriate form of order carrying out these determinations is attached. The motion of the Pyramid Lake Paiute Tribe of Indians for attorneys' fees and other expenses is granted to the extent set forth above.

ORDER

On consideration of plaintiff's motion for attorneys' fees and other incidental expenses, the Court, for reasons set forth in an accompanying Memorandum, grants the motion and directs that the Secretary of the Interior shall pay to plaintiff a total sum of $106,197.31, which amount is to be disbursed by plaintiff, upon receipt, for attorneys' fees and incidental expenses as scheduled below:

To Robert D. Stitser, Esquire	$24,329.92
To Native American Rights Fund	$61,378.57
To Woodward-Clevenger & Associates	$19,341.65
To Clyde-Criddle-Woodward, Inc.	$ 1,147.07

So ordered.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-342

PYRAMID LAKE PAIUTE TRIBE OF INDIANS, PETITIONER

v.

ROGERS C.B. MORTON, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that attorneys' fees and expenses and expert witnesses' fees could not be awarded against the Secretary of the Interior in this case.

Petitioner filed this action in the United States District Court for the District of Columbia challenging the validity of operating criteria adopted by the Secretary to govern the amount of water that could be diverted by the Newlands Reclamation Project from the Truckee and Carson Rivers in the State of Nevada for irrigation purposes. Finding that the Secretary's operating criteria for the water year 1972-1973 were arbitrary and capricious in failing to prevent unnecessary waste within the reclamation district and in unlawfully depriving the Tribe of water, the district court ordered the Secretary to submit amended criteria.

The district court subsequently rejected the new operating criteria proposed by the Secretary and ordered the Tribe to submit appropriate operating criteria that would comply with the court's memorandum and order. After a hearing on the resulting proposed criteria, the court adopted recommendations made by the Department of Justice for the water year 1972-1973 and, with minor modifications, adopted the operating criteria proposed by the Tribe for the water year extending from November 1, 1973, to October 31, 1974. That decision was not appealed.

The district court thereafter granted petitioner's motion for an award of attorneys' fees and expenses and expert witnesses' fees in the amount of $106,197.31, on the ground that 25 U.S.C. 175 and 476 provide the specific statutory authority required by 28 U.S.C. 2412 for assessment of attorneys' fees and expenses and expert witnesses' fees against the Secretary (Pet. App. 33a-39a; 360 F. Supp. 669). The Secretary appealed and the court of appeals (McGowan, Robinson, and Weigel, JJ.) reversed the district court's award (Pet. App. 28a-31a; 499 F. 2d 1095). The court of appeals held that, in the absence of a statute specifically authorizing an award of attorneys' fees and expenses, "the District Court is without general power to award attorneys' fees against the United States" (Pet. App. 30a), and that neither Section 175 nor Section 476, either separately or when read together, constitutes the requisite specific statutory consent.

1. The court of appeals' holding (Pet. App. 30a-31a) that, absent specific statutory authority for such an award, the district court lacked power to award attorneys' fees and expenses and expert witnesses' fees against the United States or its officers, properly applied the

well-established principle codified in 28 U.S.C. 2412. See, *e.g.*, *United States* v. *Worley*, 281 U.S. 339, 344; *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 20-21; *Wilderness Society* v. *Morton*, 495 F. 2d 1026, 1036 (C.A. D.C.), certiorari granted on other grounds *sub nom. Alyeska Pipeline Serv. Co.* v. *Wilderness Society*, No. 73-1977, argued January 22, 1975; *Citizens Committee for the Columbia River* v. *Callaway*, 494 F. 2d 124, 126 (C.A. 9); *Cassata* v. *Federal Sav. & Loan Ins. Corp.*, 445 F. 2d 122, 125-126 (C.A. 7).

Nor is there any conflict concerning the court of appeals' rejection of petitioner's assertions that 25 U.S.C. 175[1] and 25 U.S.C. 476[2] constitute, separately or together, such a specific statutory authorization. That contention was squarely rejected in *United States* v. *Gila River Pima-Maricopa Indian Community*, 391 F. 2d 53, 56-57 (C.A. 9), and *Ricon Band of Mission Indians* v. *Escondido Mut. Water Co.*, 459 F. 2d 1082, 1084-1085 (C.A. 9), to which petitioner makes no reference. Indeed, as the Ninth Circuit declared in *Rincon Band*, Section 175, upon which the Tribe heavily relies, requires the United States neither

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[1]Section 175 provides:

> In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity.

[2]Section 476 provides in pertinent part:

* * * * *

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interest in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

to provide legal services nor to finance collateral or substitute assistance. Section 476 merely provides the Secretary with the authority to permit Indian tribes to retain independent legal counsel of their choice. As the court of appeals stated (Pet. App. 31a), nothing in Section 476 or its legislative history supports the claim that that section authorizes an award of attorney's fees and expenses against the United States or an officer of the United States acting in his official capacity.

Petitioner's assertion that the Administrative Procedure Act, 5 U.S.C. 701, *et seq.*, provides the requisite statutory consent to an award of attorneys' fees and expenses is also without substance. Even if it is assumed, *arguendo,* that the Act constitutes an implied waiver of sovereign immunity against suit, nothing in the Act can be construed as constituting specific statutory authorization for an award of attorneys' fees and expenses against the United States or an officer of the United States acting in his official capacity. Cf. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717-720. Compare, *e.g.*, 42 U.S.C. 1857h-2; *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 484 F. 2d 1331, 1334-1336 (C.A. 1).

2. There is no question or conflict concerning the effect of 28 U.S.C. 2412[3] warranting resolution by this Court.

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[3]28 U.S.C. 2412 provides:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his offical capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States.

Section 2412, as originally enacted in 1948, provided that "[t]he United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress" (62 Stat. 973), thereby codifying "the well-known common-law rule that a sovereign is not liable for costs unless specific provision for such liaibility is made by law." H. Rep. No. 308, 80th Cong., 1st Sess., p. A189; cf. Fed. R. Civ. P. 54(d). In 1966 Congress amended Section 2412, at the request of the Attorney General, to provide in its present form that, "[e]xcept as otherwise specifically provided by statute, a judgment for costs * * * but not including the fees and expenses of attorneys may be awarded * * * in any civil action brought by or against the United States or any agency or official of the United States * * *."

As the court of appeals correctly noted (Pet. App. 29a-30a), the legislative history makes it clear that the 1966 revision of Section 2412 did not affect the traditional rule that the United States or its officers were not liable for attorneys' fees absent express statutory authority. The Department of Justice and the courts have consistently construed Section 2412 as confirming that traditional immunity. See, *e.g., Natural Resources Defense Council, supra,* 484 F. 2d at 1333-1335.

3. There is no merit to petitioner's contention that this Court has itself terminated the longstanding immunity of the United States and its officers from liability for attorneys' fees, expenses or other costs where not expressly authorized by statute. Petitioner's reliance upon this Court's *per curiam* affirmance in *Sims* v. *Amos,* 409 U.S. 942 (Pet. 5, 12-14), is unpersuasive, for that case involved state officials and raised no question concerning the immunity of the United States or its officers codified in 28 U.S.C. 2412.

Nor was the traditional rule of immunity as to fees and costs affected by the decisions in *Reconstruction Finance Corp.* v. *J.G. Menihan Corp.*, 312 U.S. 81, and *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138, on which petitioner relies (Pet. 16-21). In *Menihan* the assessment was against an independent government corporation launched into the commercial world with unqualified statutory authority "to sue and be sued"; as such it was on an "equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances." 312 U.S. at 85-86. The Secretary of the Interior, however, has been given no such authority. The issue of awarding attorneys' fees and expenses against an officer or agency of the United States was in no way presented in *Nash-Finch*. The Court there held only that 28 U.S.C. 2283 did not prohibit the district court, upon the Board's request, from enjoining the enforcement of a state court injunction limiting a union's picketing activities.

As this Court has recently noted in a related context, "Congress is aware of the issue" whether attorneys' fee awards should be more widely available in federal litigation, and arguments for a departure from the traditional rule here, in suits against the United States or its officers, "are properly addressed to Congress." *F.D. Rich Co.* v. *United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 131.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-342

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY TO THE RESPONDENT'S MEMORANDUM IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-342

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY TO THE RESPONDENT'S MEMORANDUM IN OPPOSITION[1]

1. The Secretary's Response does not address the Tribe's main contention in support of its argument that the government has consented to the attorneys' fee award in the unique circumstances presented by this case. In its petition (pp. 19-21), the Tribe placed its

[1] By order of the Court, the Solicitor General was directed to file his response to the Tribe's petition by February 1, 1975. On February 7, 1975, the Solicitor General gave the Tribe's counsel a copy of his Memorandum in Opposition which, as we understand it, was then being sent to the printer. This reply is in response to that draft memorandum which had not been filed on February 9, 1975 when we went to press.

principal reliance on the funds that have been and continue to be authorized and appropriated by Congress for the purpose of protecting Indian water rights. We pointed out that these funds had in fact been used to enable Indian tribes to retain expert hydrologic consultants and attorneys, the same purposes that would be served by the district court's award.

On January 13, 1975, the Commissioner of Indian Affairs, Morris Thompson, filed an affidavit with the United States Court of Appeals for the Tenth Circuit in case No. 74-1069, *State of New Mexico* v. *Aamodt*. It is reproduced in the Appendix to this Reply (pp. 9a-12a). Four New Mexico Pueblos appealed from the district court's denial of their motions to intervene in a pending water rights adjudication in which Justice Department attorneys were representing the United States as trustee on behalf of the four Pueblos. The Commissioner's affidavit recites that because of the government's fiduciary obligations to the Pueblos and its conflicting responsibilities to opposing interests, the BIA had approved a contract between the Pueblos and private attorneys and had provided funds for all of their "services, disbursements and expenses." The Commissioner stated that the district court's order denying the Pueblos' intervention "defeats the intentions and actions of the Bureau of Indian Affairs—that the government's trust responsibilities to the Pueblos . . . be discharged by providing private counsel of the Indians' choice to work in cooperation with, but independently from, the attorneys of the Department of Justice."

If private attorneys are required to represent the interests of Indians in protecting and preserving their water rights when the Department of Justice is at least

nominally on the same side, they are even more essential when a tribe must sue the government to protect its property. If the BIA has the authority and the obligation to provide funds for the Pueblos' private attorneys, it has the same authority and even more of an obligation to pay for the Pyramid Lake Tribe's reasonable attorneys' fees awarded by the district court after the government had repeatedly and consistently failed to honor its fiduciary obligations. The Commissioner's recent affidavit establishes beyond any doubt that the policies of Congress and the Interior Department would be furthered, not frustrated, by a decision upholding the district court's award.

2. The distinction between costs and attorneys' fees, which is essential to a proper understanding of 28 U.S.C. § 2412, was made by this Court in *People of Sioux County* v. *National Surety Co.*, 276 U.S. 238, 243-44 (1928) as well as in *Trustees of the Internal Improvement Fund* v. *Greenough*, 105 U.S. 527 (1882). *See* Pet. at pp. 8-9. Both cases narrowly construed "costs" statutes so as to permit attorneys' fee awards.

In the *Sioux County* case, the Court held that attorneys' fees are not "costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like" and, therefore, are "not within the field of costs legislation covered by" the fee bill of 1878. And then, even more importantly for our purposes, the Court stated:

> That the particular mode of enforcing the right [to an attorneys' fee award]—i.e. by taxing the allowance as costs—is not available to the federal courts under [the fee bill of 1878] does *not* preclude the recovery. 276 U.S. at 243-44. (emphasis added)

3. In September 1974, at approximately the same time that the Tribe's petition was filed, the United States submitted a Brief in case Nos. 73-1790 and 73-2033 before the United States Court of Appeals for the Fifth Circuit in *Gates* v. *Collier* and *Newman* v. *Alabama*.[2] The United States argued that this Court's Eleventh Amendment decision in *Edelman* v. *Jordan*, 415 U.S. 651, 39 L.Ed2d 662 (1974), does not bar the award of attorneys' fees against state officials in suits seeking equitable relief from constitutional violations.

> The award of attorneys' fees in the cases, now before this Court, does not fall within either the letter or the spirit of the *Edelman* decision as an award of attorneys' fees is not a "cause of action" but a normal and incidental consequence of litigation. In choosing to defend an action which is properly within the federal forum, defendants must assume responsibility for these tangential expenses. Cf. *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927).[3]

Other than its reliance on 28 U.S.C. § 2412, the government offers no legal or policy reasons why sovereign immunity should preclude equitable awards of attorneys' fees against the federal government even though the Eleventh Amendment does not afford the same protection to the states and their officials. Indeed, such a result would be anomalous in the extreme and should obviously be avoided if at all possible.

4. The issue presented in this case, whether federal courts are powerless to award attorneys' fees against

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[2] These cases are presently being considered by the Fifth Circuit en banc. *See* the discussion of the panel's original decision in *Gates* at p. 13 of the Tribe's petition.

[3] Brief of the United States in Gates v. Collier, *supra* at p. 7.

federal officials absent (very) express statutory consent, is not properly before the Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society* (No. 73-1977, argued January 22, 1975). There the environmental plaintiffs sought attorneys' fees only from Alyeska, not from the federal defendant. The court of appeals reached the § 2412 issue *sua sponte* without benefit of briefing.[4] Neither Alyeska, the petitioner, nor the environmental plaintiffs, the respondents, have challenged the court of appeals' 50 percent reduction in its attorneys' fee award that resulted from its construction of § 2412.[5] The respondents seek only an affirmance of the court of appeals' award. Therefore, under the rules of this Court, the § 2412 and federal immunity issues are not presented in the *Alyeska* litigation.[6]

5. There is a subtle, apparently unnoticed, yet nonetheless significant difference between the treatment accorded § 2412 in *Wilderness Society*[7] and in the opinions below of both the district court and the same court of appeals. In *Wilderness Society*, the court of appeals observed (incorrectly) that "under 28 U.S.C. § 2412 . . . no attorneys' fees can be imposed against the United States."[8] By contrast, both the district court (360 F.Supp. 669, 670; App. 35a) and the court of appeals (499 F.2d 1095, 1096; App. 29a) noted (cor-

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[4] Wilderness Society v. Morton, 495 F.2d 1026, 1036 (D.C. Cir. 1974).

[5] The court of appeals could (and should) have reached the same result on the basis of the plaintiffs' failure, and consequent waiver of their right, to seek attorneys' fees against the federal government.

[6] Rule 23(d) of the Supreme Court Rules.

[7] *Supra*, note 4.

[8] 495 F.2d at 1036. It subsequently referred to § 2412 as a "statutory bar." *Id.*

rectly) that § 2412 does no more than codify existing law. This distinction is critical to the outcome of this case.

If § 2412 is a codification of existing law, the first inquiry is to determine what the existing law is. As we showed in our petition (pp. 15-21), both the district court and the court of appeals erred in their unanalyzed reliance upon the dicta of *United States* v. *Worley*, 281 U.S. 339, 344 (1930), a case in which the federal courts' equitable jurisdiction was *not* invoked. Rather, as the Second Circuit has now explicitly held in *Class* v. *Norton*, 505 F.2d 123 (1974),[9] and as the United States has argued in its recent Brief to the Fifth Circuit,[10] there is nothing in the immunity doctrine or in *Edelman* v. *Jordan*, *supra*, that bars equitable awards of attorneys' fees against state (and inferentially federal) officials found to have acted unlawfully or unconstitutionally.[11]

Once it is determined that federal courts have the equitable power to award attorneys' fees against federal or state officials under existing law, i.e. what the law would be in the absence of § 2412, and that § 2412 merely codifies existing law, the district court's award must be affirmed, albeit on different grounds. Without

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[9] Class v. Norton upheld an attorney's fee award against a state official acting in his official capacity on the basis of the official's bad faith or "unreasonable, obdurate obstinacy" in the litigation. 505 F.2d at 127. The district court here entered similar findings as to the Secretary's conduct during the course of the litigation. 360 F. Supp. 669 at 670; Pet. 34a.

[10] *See* text accompanying notes 2 and 3, *supra*.

[11] The question of the immunity of state officials is squarely presented in Jordan v. Gilligan, No. 74-403, in which the Sixth Circuit came to the opposite conclusion.

exception, the lower courts that have considered the federal immunity question have erred in not approaching the problem by way of examining the law applicable to the alleged immunity of state officials. If they had and if they reached the same result as the Second Circuit and the United States, they could not have concluded that § 2412 "necessarily and inescapably," or "in so many words" [12] restricts the federal courts from exercising an equitable remedy otherwise within their jurisdiction.

These important matters deserve this Court's attention. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

February 1975

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[12] Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). *See* Pet. 11.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH DISTRICT

No. 74-1069

STATE OF NEW MEXICO
Co-Respondent,

v.

R. LEE AAMODT, ET AL.,
Co-Respondents

PUEBLO DE SAN ILDEFONSO
PUEBLO DE POJOAQUE
PUEBLO DE NAMBE
PUEBLO DE TESUQUE
PETITIONERS

AFFIDAVIT

Morris Thompson, being first duly sworn, deposes and says:

1. I am presently Commissioner of Indian Affairs of the United States Department of the Interior. I was appointed to this post by the President, confirmed by the United States Senate on December 3, 1973, and have served continuously since that date.

2. I have been informed that the Pueblos of Tesuque, Pojoaque, Nambe, and San Ildefonso are taking an appeal to the Tenth Circuit Court of Appeals from the Order of the District Court in *State of New Mexico* v. *Aamodt*, No. 6639—Civil (D.N.M.) entered on December 6, 1974, denying the private attorneys for such Pueblos the right to represent

them separately and independently from the attorneys for the United States and striking *sua sponte* a Complaint-in-Intervention filed by such Pueblos on November 12, 1974. I am giving this affidavit because I believe that these decisions interfere with important actions by the Bureau of Indian Affairs in fulfillment of the trust obligations of the United States to protect its Indian wards and their property, including water rights.

3. The issues raised by the *Aamodt* case concerning the water rights of the four Indian Pueblos have long been of concern to officials at the highest levels of the Department of the Interior. We believe that the ultimate decision by the courts in this case will have far-reaching consequences as a judicial precedent, affecting the other 15 New Mexico Pueblos and perhaps Indian tribes in other states.

4. Conflicts of interest often arise between the trust obligations of the United States and the programs and policies of various federal agencies. On the one hand, the United States has a strict fiduciary obligation to protect and preserve Indian rights to natural resources, including rights to land, water, minerals, timber and to hunt and fish. On the other hand, certain federal agencies are charged by statute with administering programs that conflict with Indian claims to these same natural resources. In this *Aamodt* case, for example, the United States Forset Service has assembled a claim to water in the same watershed involved in the litigation. Allegations have also been made that other federal agencies would profit from restricting the water rights claims of these four Pueblos. Irrespective of the ultimate validity of these allegations, I believe it is important for the United States to avoid even the appearance of a conflict of interest in a case of such far-reaching significance.

5. For the above reasons, the Bureau of Indian Affairs has in this instance, as in other similar cases, decided that

private counsel independent of any possible conflict of interest should be furnished to represent the Indian interests. The Bureau's Albuquerque Area Director approved a special attorney contract on March 28, 1974, pursuant to which the three attorneys could be funded to represent the Pueblos in the *Aamodt* litigation.

6. The Bureau of Indian Affairs has provided all funds for the services, disbursements, and expenses of these attorneys. It was contemplated that the private attorneys would cooperate with, but would be independent from, the Government's attorneys in the Department of Justice. Those were deliberate actions to fulfill the Government's trust obligations to the Pueblos.

7. The Order entered by the District Court of December 6, 1974, defeats the intention and actions of the Bureau of Indian Affairs—that the Government's trust responsibilities to the Pueblos in this case shall be discharged by providing private counsel of the Indians' choice to work in cooperation with, but independently from, the attorneys of the Department of Justice.

8. The decisions described above on behalf of the United States as trustee were made in the sound discretion of the Bureau of Indian Affairs under the legal mandate of Congress and the Courts to function as a trustee for the protection of Indian rights and property. They are, in my opinion, essential to the implementation of the trust obligations of the United States in this *Aamodt* case.

/s/ MORRIS THOMPSON
Morris Thompson
Commissioner of Indian Affairs

STATE OF NEW MEXICO
COUNTY OF BERNALILLO, : ss

The foregoing Affidavit was executed before me this 13th day of January, 1975 by MORRIS THOMPSON, Commissioner of Indian Affairs, Department of the Interior.

/s/ SANDRA GOZGI
[illegible]
Notary Public

My Commission Expires:
April 14, 1977